

AMENDED IN ASSEMBLY APRIL 17, 2002

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 1938

Introduced by Assembly Member Aroner
(~~Coauthor: Assembly Member Reyes~~)

February 14, 2002

An act to amend Sections 391 and 391.7 of the Code of Civil Procedure, to amend ~~Section 3401~~ Sections 210, 3041, and 8804 of the Family Code, and to amend Sections 1000, 1470, 1513, and 1601 of, and to add Chapter 3 (commencing with Section 1610) to Part 2 of Division 4 of, the Probate Code, relating to guardianship, conservatorship, and custody.

LEGISLATIVE COUNSEL'S DIGEST

AB 1938, as amended, Aroner. Guardianship: conservatorships: custody.

(1) *Existing law authorizes a defendant in any litigation pending in any court of this state, at any time until final judgement is entered, to move for a court order requiring the plaintiff to furnish security as a vexatious litigant, as defined. The litigation must be dismissed as to the defendant for whose benefit the security was ordered, if it is not furnished.*

This bill would clarify that these provisions apply to proceedings under the Family Code or Probate Code, and specifically extend these provisions to any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order from which an appeal may be taken.

(2) Under existing law, before making an order granting custody to a person or persons other than a parent, without the consent of the parents, a court is required to make a finding that granting custody to a parent would be detrimental to the child and that granting custody to ~~the~~ a nonparent is required to serve the best interest of the child.

~~This bill would establish evidentiary standards for a finding that parental custody would be detrimental to the child, instead, provide that such a finding be made over the objection of a parent. The bill would define detriment to a child, and require a finding that parental custody is detrimental to the child to be supported by clear and convincing evidence unless the court finds by a preponderance of the evidence that custody would be granted to a person who has assumed the role of a parent for a substantial period, and would make related changes. This finding would constitute a finding that parental custody would be detrimental to the child, absent a showing by clear and convincing evidence to the contrary, as specified. A finding of detriment to the child would not require any finding of unfitness of the parents for these purposes.~~

~~(2)~~

(3) Under the Guardianship-Conservatorship Law, a court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee, if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

~~This bill would provide, instead, that further require the court may appoint legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee if the court finds that the appointment would be helpful to the resolution of the matter to appoint legal counsel for a minor who is the subject of a guardianship proceeding, if the court finds the appointment is necessary to represent the substantial interests of a minor in specified proceedings. Moreover, if the court determines that a ward, a proposed ward, a conservatee, or a proposed conservatee is not otherwise represented by legal counsel, the court would be required to appoint legal counsel for the person who is the subject of the proceeding, if the court finds that the appointment is necessary to protect the person's interest. However, if any person objects to recommendations of the court investigation report regarding a matter before the court, the court would be required to appoint legal counsel~~



~~unless the court finds by clear and convincing evidence that the interest of the minor are otherwise fully represented in the proceeding.~~

~~(3)~~

(4) Under existing law, unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate.

This bill would make this investigation, and report and recommendation, mandatory.

~~(4)~~

(5) Under existing law, upon the petition of the guardian, a parent, or the ward, a court may make an order terminating the guardianship if the court determines that it is no longer necessary that the ward have a guardian or that it is in the ward's best interest to terminate the guardianship.

This bill would delete the determination that the guardianship is no longer necessary as grounds for an order terminating guardianship. ~~The bill would also provide that if a person files a petition for visitation, termination of the guardianship, or instruction to the guardian that is unmeritorious, or intended to harass or annoy the guardian, and the person has previously filed pleadings in the guardianship proceedings which were unmeritorious, or intended to harass or annoy the guardian, this petition shall be grounds for the court to determine that the person is a vexatious litigant.~~ The bill would make various legislative findings.

~~(5)~~

(6) The bill would impose a state-mandated local program by requiring new duties of local officers.

~~(6)~~

(7) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.



Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. *Section 391 of the Code of Civil Procedure is*
2 *amended to read:*

3 391. As used in this title, the following terms have the
4 following meanings:

5 (a) “Litigation” means any civil action or proceeding,
6 *including, but not limited to, a proceeding under the Family Code*
7 *or Probate Code*, commenced, maintained or pending in any state
8 or federal court.

9 (b) “Vexatious litigant” means a person who does any of the
10 following:

11 (1) In the immediately preceding seven-year period has
12 commenced, prosecuted, or maintained in propria persona at least
13 five litigations other than in a small claims court that have been (i)
14 finally determined adversely to the person or (ii) unjustifiably
15 permitted to remain pending at least two years without having been
16 brought to trial or hearing.

17 (2) After a litigation has been finally determined against the
18 person, repeatedly relitigates or attempts to relitigate, in propria
19 persona, either (i) the validity of the determination against the
20 same defendant or defendants as to whom the litigation was finally
21 determined or (ii) the cause of action, claim, controversy, or any
22 of the issues of fact or law, determined or concluded by the final
23 determination against the same defendant or defendants as to
24 whom the litigation was finally determined.

25 (3) In any litigation while acting in propria persona, repeatedly
26 files unmeritorious motions, pleadings, or other papers, conducts
27 unnecessary discovery, or engages in other tactics that are
28 frivolous or solely intended to cause unnecessary delay.

29 (4) Has previously been declared to be a vexatious litigant by
30 any state or federal court of record in any action or proceeding
31 based upon the same or substantially similar facts, transaction, or
32 occurrence.

33 (c) “Security” means an undertaking to assure payment, to the
34 party for whose benefit the undertaking is required to be furnished,
35 of the party’s reasonable expenses, including attorney’s fees and

1 not limited to taxable costs, incurred in or in connection with a
2 litigation instituted, caused to be instituted, or maintained or
3 caused to be maintained by a vexatious litigant.

4 (d) “Plaintiff” means the person who commences, institutes or
5 maintains a litigation or causes it to be commenced, instituted or
6 maintained, including an attorney at law acting in propria persona.

7 (e) “Defendant” means a person (including corporation,
8 association, partnership and firm or governmental entity) against
9 whom a litigation is brought or maintained or sought to be brought
10 or maintained.

11 *SEC. 2. Section 391.7 of the Code of Civil Procedure is*
12 *amended to read:*

13 391.7. (a) In addition to any other relief provided in this title,
14 the court may, on its own motion or the motion of any party, enter
15 a prefiling order which prohibits a vexatious litigant from filing
16 any new litigation in the courts of this state in propria persona
17 without first obtaining leave of the presiding judge of the court
18 where the litigation is proposed to be filed. Disobedience of such
19 an order by a vexatious litigant may be punished as a contempt of
20 court.

21 (b) The presiding judge shall permit the filing of such litigation
22 only if it appears that the litigation has merit and has not been filed
23 for the purposes of harassment or delay. The presiding judge may
24 condition the filing of the litigation upon the furnishing of security
25 for the benefit of the defendants as provided in Section 391.3.

26 (c) The clerk ~~shall~~ *may* not file any litigation presented by a
27 vexatious litigant subject to a prefiling order unless the vexatious
28 litigant first obtains an order from the presiding judge permitting
29 the filing. If the clerk mistakenly files the litigation without such
30 an order, any party may file with the clerk and serve on the plaintiff
31 and other parties a notice stating that the plaintiff is a vexatious
32 litigant subject to a prefiling order as set forth in subdivision (a).
33 The filing of ~~such a~~ *the* notice shall automatically stay the
34 litigation. The litigation shall be automatically dismissed unless
35 the plaintiff within 10 days of the filing of such notice obtains an
36 order from the presiding judge permitting the filing of the
37 litigation as set forth in subdivision (b). If the presiding judge
38 issues an order permitting the filing, the stay of the litigation shall
39 remain in effect, and the defendants need not plead, until 10 days
40 after the defendants are served with a copy of any such order.

1 (d) *For purposes of this section, “litigation” includes any*
2 *petition, application, or motion other than a discovery motion, in*
3 *a proceeding under the Family Code or Probate Code, for any*
4 *order from which an appeal may be taken.*

5 (e) The clerk of the court shall provide the Judicial Council a
6 copy of any prefiling orders issued pursuant to subdivision (a). The
7 Judicial Council shall maintain a record of vexatious litigants
8 subject to such prefiling orders and shall annually disseminate a
9 list of such persons to the clerks of the courts of this state.

10 SEC. 3. *Section 210 of the Family Code is amended to read:*

11 210. Except to the extent that any other statute or rules
12 adopted by the Judicial Council provide applicable rules, the rules
13 of practice and procedure applicable to civil actions generally,
14 *including the provisions of Title 3a (commencing with Section 391)*
15 *of Part 2 of the Code of Civil Procedure*, apply to, and constitute
16 the rules of practice and procedure in, proceedings under this code.

17 SEC. 4. Section 3041 of the Family Code is amended to read:

18 3041. (a) Before making an order granting custody to a
19 person or persons other than a parent, ~~without the consent of the~~
20 ~~parents~~ *over the objection of a parent*, the court shall make a
21 finding that granting custody to a parent would be detrimental to
22 the child and that granting custody to the nonparent is required to
23 serve the best interest of the child. Allegations that parental
24 custody would be detrimental to the child, other than a statement
25 of that ultimate fact, shall not appear in the pleadings. The court
26 may, in its discretion, exclude the public from the hearing on this
27 issue.

28 (b) ~~For purposes of this section~~ *Subject to subdivision (d)*, a
29 finding that parental custody would be detrimental to the child
30 shall be supported by clear and convincing evidence.

31 (c) *As used in this section, “detriment to the child” includes the*
32 *harm of removal from a stable placement of a child with a person*
33 *who has assumed, on a day-to-day basis, the role of his or her*
34 *parent, fulfilling both the child’s physical needs and the child’s*
35 *psychological needs for care and affection, and who has assumed*
36 *that role for a substantial period of time. A finding of detriment*
37 *does not require any finding of unfitness of the parents.*

38 (d) Notwithstanding subdivision (b), if the court finds by a
39 preponderance of the evidence that the ~~child’s primary emotional~~
40 ~~bonding is to someone other than a parent, and that person is~~

1 ~~willing to accept custody of the child, the court shall find that~~
2 ~~parental custody would be detrimental absent a showing by clear~~
3 ~~and convincing evidence that parental custody would not be~~
4 ~~detrimental to the child: person to whom custody may be given is~~
5 ~~a person described in subdivision (c), this finding shall constitute~~
6 ~~a finding that parental custody would be detrimental to the child~~
7 ~~absent a showing by clear and convincing evidence to the contrary.~~

8 SEC. 2.—Section 1470 of the Probate Code is amended to read:

9 1470. (a) (1) ~~The court may appoint legal counsel for a~~
10 ~~ward, a proposed ward, a conservatee, or a proposed conservatee~~
11 ~~in any proceeding under this division if the court finds that the~~
12 ~~appointment would be helpful to the resolution of the matter.~~

13 ~~(2) If the court determines that a ward, a proposed ward, a~~
14 ~~conservatee, or a proposed conservatee in any proceeding under~~
15 ~~this division is not otherwise represented by legal counsel, the~~
16 ~~court shall appoint legal counsel for the person who is the subject~~
17 ~~of the proceeding if the court finds that the appointment is~~
18 ~~necessary to protect the person's interest.~~

19 ~~(3) If any person objects to recommendations of the court~~
20 ~~investigation report under Section 1513 regarding a matter before~~
21 ~~the court, the court shall appoint legal counsel unless the court~~
22 ~~finds by clear and convincing evidence that the interest of the~~
23 ~~minor are otherwise fully represented in the proceeding.~~

24 ~~(b) If a person is furnished legal counsel under this section, the~~
25 ~~court shall, upon conclusion of the matter, fix a reasonable sum for~~
26 ~~compensation and expenses of counsel. The sum may, in the~~
27 ~~discretion of the court, include compensation for services~~
28 ~~rendered, and expenses incurred, before the date of the order~~
29 ~~appointing counsel.~~

30 ~~(c) The court shall order the sum fixed under subdivision (b) to~~
31 ~~be paid:~~

32 ~~(1) If the person for whom legal counsel is appointed is an~~
33 ~~adult, from the estate of that person.~~

34 ~~(2) If the person for whom legal counsel is appointed is a minor,~~
35 ~~by a parent or the parents of the minor or from the minor's estate,~~
36 ~~or any combination thereof, in any proportions the court deems~~
37 ~~just.~~

38 ~~(d) The court may make an order under subdivision (c)~~
39 ~~requiring payment by a parent or parents of the minor only after~~
40 ~~the parent or parents, as the case may be, have been given notice~~

1 ~~and the opportunity to be heard on whether the order would be just~~
2 ~~under the circumstances of the particular case.~~

3 ~~SEC. 3.~~

4 *SEC. 5. Section 8804 of the Family Code is amended to read:*

5 8804. (a) Whenever the petitioners move to withdraw the
6 petition for the adoption or to dismiss the proceeding, the clerk of
7 the court in which the proceeding is pending shall immediately
8 notify the department at Sacramento of the action. The department
9 or the delegated county adoption agency shall file a full report with
10 the court recommending a suitable plan for the child in every case
11 where the petitioners move to withdraw the petition for the
12 adoption or where the department or delegated county adoption
13 agency recommends that the petition for adoption be denied and
14 shall appear before the court for the purpose of representing the
15 child.

16 (b) Notwithstanding the withdrawal or dismissal of the
17 petition, the court may retain jurisdiction over the child for the
18 purposes of making any order for the child's custody that the court
19 deems to be in the child's best interest.

20 (c) If a birth parent who did not place a child for adoption as
21 specified in Section 8801.3 has refused to give the required
22 consent, or a birth parent revokes consent as specified in Section
23 8814.5, the court shall order the child restored to the care and
24 custody of the birth parent or parents *subject to the provisions of*
25 *Section 3041.*

26 ~~(d) This section shall become operative on January 1, 1995.~~

27 *SEC. 6. Section 1000 of the Probate Code is amended to read:*

28 1000. Except to the extent that this code provides applicable
29 rules, the rules of practice applicable to civil actions, including
30 discovery proceedings *and proceedings under Title 3a*
31 *(commencing with Section 391) Part 2 of the Code of Civil*
32 *Procedure*, apply to, and constitute the rules of practice in,
33 proceedings under this code. All issues of fact joined in probate
34 proceedings shall be tried in conformity with the rules of practice
35 in civil actions.

36 *SEC. 7. Section 1470 of the Probate Code is amended to read:*

37 1470. (a) (1) The court may appoint private legal counsel for
38 a ward, a proposed ward, a conservatee, or a proposed conservatee
39 in any proceeding under this division if the court determines the
40 person is not otherwise represented by legal counsel and that the

1 appointment would be helpful to the resolution of the matter or is
2 necessary to protect the person's interests.

3 (2) *The court shall, at or before the time of the hearing, appoint*
4 *counsel to represent the interest of a minor who is the subject of a*
5 *guardianship proceeding and not already represented by an*
6 *attorney, if necessary to protect substantial interests of the minor*
7 *in any of the following proceedings under this division regarding*
8 *the minor:*

9 (A) *A proceeding to establish a guardianship or to appoint a*
10 *proposed guardian.*

11 (B) *A proceeding to terminate the guardianship.*

12 (C) *A proceeding to remove the guardian.*

13 (b) If a person is furnished legal counsel under this section, the
14 court shall, upon conclusion of the matter, fix a reasonable sum for
15 compensation and expenses of counsel. The sum may, in the
16 discretion of the court, include compensation for services
17 rendered, and expenses incurred, before the date of the order
18 appointing counsel.

19 (c) The court shall order the sum fixed under subdivision (b) to
20 be paid:

21 (1) If the person for whom legal counsel is appointed is an
22 adult, from the estate of that person.

23 (2) If the person for whom legal counsel is appointed is a minor,
24 by a parent or the parents of the minor or from the minor's estate,
25 or any combination thereof, in any proportions the court deems
26 just.

27 (d) The court may make an order under subdivision (c)
28 requiring payment by a parent or parents of the minor only after
29 the parent or parents, as the case may be, have been given notice
30 and the opportunity to be heard on whether the order would be just
31 under the circumstances of the particular case.

32 SEC. 8. Section 1513 of the Probate Code is amended to read:

33 1513. (a) Unless waived by the court, a court investigator,
34 probation officer, or domestic relations investigator shall make an
35 investigation and file with the court a report and recommendation
36 concerning each proposed guardianship of the person or
37 guardianship of the estate. Investigations where the proposed
38 guardian is a relative shall be made by a court investigator.
39 Investigations where the proposed guardian is a nonrelative shall
40 be made by the county agency designated to investigate potential

1 dependency. The report for the guardianship of the person shall
2 include, but need not be limited to, an investigation and discussion
3 of all of the following:

4 (1) A social history of the guardian.

5 (2) A social history of the proposed ward, including, to the
6 extent feasible, an assessment of any identified developmental,
7 emotional, psychological, or educational needs of the proposed
8 ward and the capability of the petitioner to meet those needs.

9 (3) The relationship of the proposed ward to the guardian,
10 including the duration and character of the relationship, where
11 applicable, the circumstances whereby physical custody of the
12 proposed ward was acquired by the guardian, and a statement of
13 the proposed ward's attitude concerning the proposed
14 guardianship, unless the statement of the attitude is affected by the
15 proposed ward's developmental, physical, or emotional condition.

16 (4) The anticipated duration of the guardianship and the plans
17 of both natural parents and the proposed guardian for the stable and
18 permanent home for the child. The court may waive this
19 requirement for cases involving relative guardians.

20 (b) The report shall be read and considered by the court prior
21 to ruling on the petition for guardianship, and shall be reflected in
22 the minutes of the court. The person preparing the report may be
23 called and examined by any party to the proceeding.

24 (c) If the investigation finds that any party to the proposed
25 guardianship alleges the minor's parent is unfit, as defined by
26 Section 300 of the Welfare and Institutions Code, the case shall be
27 referred to the county agency designated to investigate potential
28 dependencies. Guardianship proceedings shall not be completed
29 until the investigation required by Sections 328 and 329 of the
30 Welfare and Institutions Code is completed and a report is
31 provided to the court in which the guardianship proceeding is
32 pending.

33 (d) The report authorized by this section is confidential and
34 shall only be made available to persons who have been served in
35 the proceedings or their attorneys. The county clerk shall make
36 provisions for the limitation of the report exclusively to persons
37 entitled to its receipt.

38 (e) For the purpose of writing the report authorized by this
39 section, the person making the investigation and report shall have
40 access to the proposed ward's school records, probation records,

1 and public and private social services records, and to an oral or
2 written summary of the proposed ward's medical records and
3 psychological records prepared by any physician, psychologist, or
4 psychiatrist who made or who is maintaining those records. The
5 physician, psychologist, or psychiatrist shall be available to clarify
6 information regarding these records pursuant to the investigator's
7 responsibility to gather and provide information for the court.

8 (f) This section does not apply to guardianships resulting from
9 a permanency plan for a dependent child pursuant to Section
10 366.25 of the Welfare and Institutions Code.

11 (g) For purposes of this section, a "relative" means a person
12 who is a spouse, parent, stepparent, brother, sister, stepbrother,
13 stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first
14 cousin, or any person denoted by the prefix "grand" or "great,"
15 or the spouse of any of these persons, even after the marriage has
16 been terminated by death or dissolution.

17 ~~SEC. 4.~~

18 *SEC. 9.* Section 1601 of the Probate Code is amended to read:

19 1601. Upon petition of the guardian, a parent, or the ward, the
20 court may make an order terminating the guardianship if the court
21 determines that it is in the ward's best interest to terminate the
22 guardianship. Notice of the hearing on the petition shall be given
23 for the period and in the manner provided in Chapter 3
24 (commencing with Section 1460) of Part 1.

25 ~~SEC. 5.~~

26 *SEC. 10.* Chapter 3 (commencing with Section 1610) is added
27 to Part 2 of Division 4 of the Probate Code, to read:

28
29 CHAPTER 3. PERMANENT AND STABLE HOME
30

31 1610. (a) The Legislature finds and declares that it in the best
32 interest of children to be raised in a permanent, safe, stable, and
33 ~~loving environment and that wherever possible, court~~
34 ~~determinations regarding guardianship shall be made to~~
35 ~~accomplish these goals.~~ *loving environment.*

36 (b) Unwarranted ~~petitions~~ *petitions, applications, or motions*
37 *other than discovery motions* after the guardianship has been
38 established create an environment that can be harmful to children
39 and are inconsistent with the goals of permanency, safety, and
40 stability.

1 ~~1611. — If a person files a petition for visitation, termination of~~
2 ~~the guardianship, or instruction to the guardian that is~~
3 ~~unmeritorious, or intended to harass or annoy the guardian, and the~~
4 ~~person has previously filed pleadings in the guardianship~~
5 ~~proceedings that were unmeritorious, or intended to harass or~~
6 ~~annoy the guardian, this petition shall be grounds for the court to~~
7 ~~determine that the person is a vexatious litigant for purposes of~~
8 ~~Title 3A (commencing with Section 391.7) of Part 2 of the Code~~
9 ~~of Civil Procedure. For these purposes, the term “new litigation”~~
10 ~~shall include petitions for visitation, termination of the~~
11 ~~guardianship, or instruction to the guardian.~~

12 ~~SEC. 6.~~

13 ~~SEC. 11.~~ Notwithstanding Section 17610 of the Government
14 Code, if the Commission on State Mandates determines that this
15 act contains costs mandated by the state, reimbursement to local
16 agencies and school districts for those costs shall be made pursuant
17 to Part 7 (commencing with Section 17500) of Division 4 of Title
18 2 of the Government Code. If the statewide cost of the claim for
19 reimbursement does not exceed one million dollars (\$1,000,000),
20 reimbursement shall be made from the State Mandates Claims
21 Fund.

